

ARBITRATION AWARD

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION
OF PUBLIC AND PRIVATE EMPLOYEES
(hereinafter called the "Union")

AND:

BROWNING HARVEY LTD.
(hereinafter called the "Employer")

GRIEVOR: Todd Carlisle

COUNSEL: For the Union
Leo Puddister

For the Employer
Harold M. Smith, Q.C.

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on November 8, 2010. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter for thirty (30) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.
5. The parties agreed to extend the time limit for the filing of the Award up to 45 days from the date of the hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Browning Harvey Ltd. and Local Union No. 7003 and Local Union No. 3001, Newfoundland and Labrador Association of Public and Private Employees, effective May 28, 2006 to May 27, 2011
- Consent 2 - Grievance form dated May 17, 2010, Grievance No. BH-014-10
- Consent 3 - Collective Agreement between Browning Harvey Ltd. and Local Union No. 7003 and Local Union No. 3001, Newfoundland and Labrador Association of Public and Private Employees, effective May 28, 1998 to May 27, 2003, excerpts
- Consent 4 - Collective Agreement between Browning Harvey Ltd. and Local Union No. 7003 and Local Union No. 3001, Newfoundland and Labrador Association of Public and Private Employees, effective May 28, 2003 to May 27, 2006
- TC - 1 Worksite Occupational Rehabilitation Program for Todd Carlisle dated October 9, 2009 from FIT For Work
- TC - 2 Todd Carlisle pay statement for pay period ending October 17, 2009
- TC - 3 Todd Carlisle pay statement for pay period ending October 24, 2009
- TC - 4 Time sheets for Todd Carlisle for October 17 and October 24, 2009
- TC - 5 Time sheet for Todd Carlisle for October 17, 2009

Nature of the Grievance

The Grievor, Todd Carlisle suffered a workplace injury in 2008. He went off work and was in receipt of Workers' Compensation benefits. He claims one full year of vacation entitlement for 2009, on the basis that he returned to work in 2009 within the meaning of Article 9.09 (c). The Grievor worked on two days in October, 2009, suffered a recurrence of his injury, and was then off work until April, 2010. The Employer submits that the Grievor did not return to work in 2009 within the meaning of Article 9.09 (c) and is not entitled to vacation pay for 2009.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

- | | |
|-----------|---|
| Article 9 | Seniority |
| 9:01 | <p>(a) Seniority of an employee shall mean the length of his unbroken service with the Company in the bargaining unit covered by this Agreement, except as provided for in Clause 9:01 (b) below.</p> <p>(b) It is agreed that Clause 9:01 (a) above shall not be applied to alter any seniority date which has been established prior to the effective date of this Agreement.</p> |
| 9:02 | <p>(a) The term "working days" as referred to in this Agreement shall not include Saturdays, Sundays, observed holidays or scheduled days off for the purpose of determining the time limits for any application or notice under this Agreement.</p> <p>(b) The term "working days" as referred to in this Agreement shall include days actually worked, time off for which an employee receives payment under any provision of this Agreement, or time off due to an approved absence other than layoff or a leave of absence without pay, in the case of an employee other than a regular employee.</p> |
| ... | |
| 9:09 | <p>(a) Bona-fide illness, or disability resulting from an accident, shall not normally be considered cause for discharge. If, after recovery, such an employee is unable to perform his former duties, and if there is, at that time, a regular job in his seniority group which is either vacant or held by an employee having less seniority, such an employee shall,</p> |

provided he has the required qualifications to do the job, be transferred to such position in accordance with the provisions of Clause 9:06 (a).

- * (b) Effective the date of signing this Agreement, any employee on the regular seniority list who is in receipt in benefits for Long Term Disability and Workers Compensation and currently has coverage for supplementary health and dental benefits shall cost share these benefits fifty/fifty employee and company.

Any existing employee on Long Term Disability will remain covered by Article 9.09 in the 2003-2006 Collective Agreement and convert to the 50/50 cost sharing at the expiry of the 48 months.

- (c) Any entrants into Long Term Disability or Workers Compensation shall be entitled any unused vacation entitlement for the year he went off, plus one (1) full year of vacation entitlement for the year he returns. This Article applies to family leave and special leave. The Company further agrees that no employee will lose his seniority while off on Long Term Disability or Workers Compensation.

...

Article 11 Paid Holidays

11:01 The expression "holidays" wherever used shall mean any one of the following:

New Year's Day
St. Patrick's Day (March 17)
Good Friday
The Queen's Birthday (Victoria Day)
Discovery Day
Memorial Day (July 1st)
Carnival Day (Corner Brook)
Grand Falls Day (Grand Falls-Windsor)
Regatta Day (St. John's)
Labour Day
Thanksgiving Day
Armistice (Remembrance) Day (November 11th)
Christmas Eve Day
Christmas Day
Boxing Day
New Year's Eve Day

...

11:03 Each employee shall receive holiday pay for each such holiday, provided that he is at work on the last regular scheduled work day before the holiday and the first regular scheduled work day after the holiday. An employee’s holiday pay for each such holiday, shall be an amount equal to the regular hourly rate, multiplied by eight (8), in accordance with Clause 12:03 (b).

...

Article 12 Vacations

12:01 Every employee who during the life of this Agreement completes a year of continuous service with the Company will qualify for a vacation with pay unless he has already been granted and has taken a vacation with pay in respect of that year of employment.

...

12:04 (a) Schedule of Vacation with Pay Entitlement During the Life of this Agreement

Length of Service	Length of Vacation
1 but less than 3 years	2 weeks
3 but less than 10 years	3 weeks
10 but less than 15 years	4 weeks
15 but less than 20 years	5 weeks
20 but less than 25 years	6 weeks
25 or more years	7 weeks

...

(c) If the employee during that year of service in respect of which the vacation is granted has been absent from work (in the aggregate) for more than sixty-six (66) working days (Monday through Sunday) due to layoff or any other approved absence (other than Employment Insurance Sickness Benefits, Maternity Leave, Workers’ Compensation or Long Term Disability), then vacation pay entitlement shall be calculated on a pro-rated basis of the above (i.e., the number of hours worked divided by 2080 hours multiplied by forty (40) hours for each week of vacation).

...

12:06 ...

(b) Substitution for Vacation

(i) An employee who qualifies for leave under Clause 13:04 or Employment Insurance Sickness Benefits while on vacation may change the status of his leave to family leave or to Employment Insurance Sickness Benefits effective the date of notification to the employee’s immediate Supervisor or the

Personnel Department. The employee shall submit on his return to work a certificate stating the total period during which he qualified for such leave or benefit.

...
Article 13 Paid Time Off

...
13:04 *(a) Family Leave/Illness Days

Each regular employee, except those on pro-rata, shall be credited with five (5) days' pay. Three (3) of these days, at the option of the employee and with sixteen (6) hours' notice to the Company, except in emergency situations, can be used for family leave/illness days. The remaining two (2) days, as well as any unused family leave days shall be paid to the employee at any time during the year at the employee's request.

- (b) As per Clause 13:04 (a) above, an employee who has not yet completed a full year of employment with the Company, or who has been absent from work (in the aggregate) for more than sixty-six (66) working days (Monday through Sunday) due to layoff or any other approved absence (other than Employment Insurance Sickness Benefits, Maternity Leave, Workers' Compensation, or Long Term Disability) shall be computed on the basis of eight (8) hours' credit for each one hundred and fifty-six (156) hours of employment up to a maximum of five (5) days or forty (40) hours.

...
Article 16 Hours of Work, Overtime, Premiums and Special Allowances

16:01 (a) Regular Work Week

- ...
(ii) For the purpose of this Agreement, the regular work week for all employees (other than Sanitation and Maintenance Personnel) shall consist of forty (40) hours to be worked in five (5) consecutive days of eight (8) hours each day, Monday to Friday, inclusive. The regular work week for Sanitation and Maintenance Personnel shall consist of forty (40) hours to be worked in five (5) consecutive days of eight (8) hours each shift, Monday to Saturday.

...

The parties also referred to Article 9:09 of the collective agreement between the parties effective May 28, 1998 to May 27, 2003, which states as follows:

Article 9 Seniority

...

9:09 (a) Bona-fide illness, or disability resulting from an accident, shall not normally be considered cause for discharge. If, after recovery, such an employee is unable to perform his former duties, and if there is, at that time, a regular job in his seniority group which is either vacant or held by an employee having less seniority, such an employee shall, provided he has the required qualifications to do the job, be transferred to such position in accordance with the provisions of Clause 9:06 (a).

- (b) In the event that an employee has been continuously absent from work due to illness or disability for a period of forty-eight (48) months or more, the Company will cease paying for coverage of the employee's insurance. Any entrants into the LTD to be entitled to vacations for a one (1) year period to be taken upon return to work. The Company further agrees that no employee will lose his seniority while off on Long Term Disability or Workers' Compensation.

Legislation

The *Workplace Health, Safety and Compensation Act*, RSNL 1990, c. W-11, states, in part, as follows:

...

Part VI - Return to Work and Rehabilitation
Rehabilitation

88. The commission may take those measures and make those expenditures that it may in its discretion consider necessary or expedient

- (a) to help in getting injured workers back to work;
- (b) to help in lessening or removing a handicap resulting from a worker's injury;

...

Duty to co-operate in return to work

89. (1) An employer shall co-operate in the early and safe return to work of a worker injured in his or her employment by,

- (a) contacting the worker as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery;
- (b) providing suitable employment that is available and consistent with the worker's functional abilities and that, where possible, restores the worker's pre-injury earnings;
- (c) giving the commission the information the commission may request concerning the worker's return to work; and
- (d) doing other things that may be prescribed in regulations made under section 123.

Evidence

The witnesses called by the Union were Ed Hogan, Union representative, Rick Kieley, Local Union President and Todd Carlisle, the Grievor. The witness called by the Employer was Fabian Connors, Director of Human Resources.

The Grievor, Todd Carlisle, has been a full time employee since 1989. He had a workplace injury on September 23, 2008. He went off work and was in receipt of benefits from the Workplace Health, Safety and Compensation Commission ("WHSCC") pursuant to the *Workplace Health, Safety and Compensation Act*, RSNL 1990 c. W-11 (the "*Act*"). A worksite occupational rehabilitation program was developed for the Grievor in the fall of 2009, in consultation with the WHSCC, the Employer and the Grievor. The Grievor testified that he returned to work on an easeback program commencing the week of October 12, 2009. According to the program, the Grievor was scheduled to work 3 hours per day, on 2 days in the first week and 4 hours per day on 3 days in the second week. The Grievor attended at the Employer's plant and worked 3 hours on Thursday, October 15, 2009 and 3.25 hours on Tuesday, October 20, 2009. His time was entered on the Employer's payroll records and he was paid for the hours worked in the pay periods ending October 17 and October 24, 2009. The Grievor testified that prior to his return to work he attended a work hardening program. The Grievor had a recurrence of his injury and was put off work by his orthopaedic surgeon. At the time he attended at the workplace under the program, he continued to be in receipt of Workers' Compensation benefits. He was unable to attend at the workplace again in 2009. He testified that

he went back to work on April 19, 2010, and has continued to work since that time. He has returned to his preinjury status.

When the Grievor returned to the workplace in 2009, he had 32 hours of vacation pay credits left from 2008. He was paid for those credits. He had already used the 5 special leave days and 5 family leave days to which he was entitled in 2008. The Grievor's preinjury earnings potential was based on his regular hours of work, of 8 hours per day, 5 days per week under Article 16.01. The Grievor was not paid for any vacation leave, sick leave or family leave in 2009. When he returned to work in 2010, he was paid vacation leave entitlement for the full 2010 vacation year. He was off work for more than 66 days in 2010.

Rick Kieley testified that he was off work and in receipt of Workers' Compensation benefits commencing in December, 2008. He returned to work in April, 2009 under an easeback program, and worked for one or two days. At that time he re-injured himself and went off work. He returned to work in September, 2009 on an easeback program and remained at work. He received his full vacation entitlement for the year 2009.

Ed Hogan testified that he negotiated the 1998 - 2003 and 2003 - 2006 collective agreements on behalf of the Union. The 1998-2003 collective agreement did not have a provision equivalent to the current Article 9:09 (c). Mr. Hogan said there were a number of grievances submitted under the former Article 9:09 by employees on long term disability benefits for more than one year, who claimed benefits during the period they were off work. He said as a result of the grievances not being successful, the language of Article 9:09 (c) was added to resolve the situation.

The Employer did not consider the Grievor to have returned to work until 2010. Fabian Connors testified that a return to work depends on successful completion of the early and safe return to work program and return to the preinjury job. In 2010, the Grievor returned to his preinjury job and his preinjury earnings potential. Mr. Connors testified that the Employer was following the *WHSCCAct* and policies. He testified that the Employer is required to co-operate with WHSCC under the *Act*. He said the Employer has an early and safe return to work committee with representatives of the Employer and the Union. The committee meets and agrees to an employee's return to work program before it starts. He testified that the return to work depends on successful completion of the program. He testified that Mr. Kieley's situation was different from Mr. Carlisle's situation. Mr.

Kieley returned to full time hours in the year 2009. For that reason, he received full vacation entitlement for 2009.

Union Submission

The Union requested that the Arbitrator apply the plain meaning of the language in Article 9:09 (c). The Grievor was entitled to one full year vacation entitlement for the year 2009. The Grievor was also entitled to family leave and special leave for 2009. The reference in Article 9:09 (c) to the year in which the employee “returns” to work does not specify that there must be a return to preemployment duties, and does not specify whether the length of time of the return to work is for one hour or one year or any other length of time. There was no wording in the Collective Agreement to substantiate the Employer’s position that return to work meant return to the preinjury position. The parties had amended the Collective Agreement in 2003 to add Article 9:09 (c). The new Article verified that vacation pay would be paid upon an employee’s return to work from Workers’ Compensation. The Grievor returned to work in October, 2009 when he attended at the workplace and was paid on the payroll for the hours worked. Vacation is paid based on length of service and not time worked, under Article 12:04 (a). Where an employee is absent from work for more than 66 days for reasons other than absence on Workers’ Compensation or other specified reasons, then vacation is paid pro rata. However, the payment pro rata does not apply to absence on Workers’ Compensation. The Union also referred to Article 12:06 (b) which stated that an employee who qualifies for another type of leave, such as Workers’ Compensation benefits, may have vacation leave credited back and taken at a later date. The Union also referred to the eligibility for paid holidays in Article 11. An employee was entitled to be paid under Article 11:03 if the employee was “at work” on the last day before and the first day after the holiday. There was no requirement in Article 11.03 to work a specified number of hours. Payment was based on continuous service and not time worked. The Union requested that the grievance be allowed.

Employer Submission

The Employer submitted that the Grievor was not entitled to vacation entitlement for the year 2009, under Article 9:09 (c). The Grievor went off work in 2008 and did not return to his regular hours of work until 2010. When the Grievor attended at the workplace in 2009, it was part of a return to work program and he was still in receipt of Workers’ Compensation benefits. At that time, he did not work a regular work week of 8 hours per day, 5 days per week. “Return” means a return to

regularly scheduled work in accordance with the scheduled hours of work set out in Article 16.01. The return to work program is established by the Workplace Health, Safety and Compensation Commission, and is not controlled by the Employer. The Union's interpretation of Article 9.09 (c) has the potential for abuse, because an employee could work for one hour and then be paid for a full year's vacation, which could be about \$8,000. It could not reasonably have been the intention of the parties to have this result. The Grievor was still in receipt of Workers' Compensation benefits in 2009. He could not return to work within the meaning of Article 9.09 (c) and still be in receipt of Workers' Compensation benefits. Return to work occurs when the Workers' Compensation claim is terminated. Alternatively, the Grievor must at least be able to meet all the requirements of the return to work plan, which the Grievor had not done in 2009. Under Article 11:04 (c) an employee is not entitled to holiday pay if he is also absent from work and in receipt of Workers' Compensation benefits. The Grievor is not entitled to vacation for continuous service under Articles 12:01 and 12:04. In the event that the Grievor was entitled to vacation for continuous service, then he could go off work in 2008 and not return to work in the following year and still be entitled to vacation. However, that result was not the intention of the parties. Under Article 12:01 an employee needs to complete a year of continuous service with the company to be eligible for vacation. It is not a status benefit. Under Article 12:04 there was no proration of benefits for the years between the year an employee went off work and the year the employee returned to work. The change in Article 9.09 negotiated in 2003 did not have the effect proposed by the Union. The Union's position would cause Articles 9:09 (c) and 12:04 to be in conflict with each other. There is no need for any extrinsic evidence to interpret the language of the Collective Agreement. There was no evidence of any past practice in a similar situation. The Employer requested that the grievance be denied.

Considerations

The issue before the Arbitrator concerns the interpretation of Article 9:09 (c) and whether or not the Grievor is entitled to one year's vacation entitlement for the year 2009.

The facts are not in dispute. The Grievor had a workplace injury on September 23, 2008 and went off work. He was in receipt of Workers' Compensation benefits from the WHSCC. A worksite occupational rehabilitation program was developed for the Grievor under which he would be scheduled to work 3 hours per day on 2 days in the first week and 4 hours per day on 3 days in the second week. The Grievor attended at the Employer's plant and worked 3 hours on October 15, 2009, and 3.25 hours on Tuesday, October 20, 2009. His hours of work were recorded in the

Employer's payroll records and he was paid for those hours in the pay periods ending October 17 and October 24, 2009. He had a recurrence of his injury and he was advised by his physician to stay off work. He continued to receive Workers' Compensation benefits from the date of his injury in 2008 until he went back to work on April 19, 2010. The Employer did not consider the Grievor to have returned to work in 2009, because he continued to be in receipt of Workers' Compensation benefits at that time, and he did not return to his preinjury job. The Employer considered that the Grievor returned to work in 2010, and paid him for one full year vacation entitlement for 2010.

The Union claims one full year of vacation entitlement for the year 2009 on behalf of the Grievor on the basis that he returned to work in October, 2009 and he meets the eligibility requirements of Article 9:09 (c).

When considering the interpretation of the Collective Agreement, the Arbitrator will have regard to the principles of interpretation discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition. Those principles include, that the object of construction is to determine the intention of the parties from the express provisions of the collective agreement (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that preceding collective agreements may be used as an aid to determine the intention of the parties with respect to any changes made (4:2240), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300).

The Arbitrator may consider the language in prior collective agreements, and any changes made to the language, when considering the context of the current Collective Agreement. The language used in prior collective agreements may be considered without the need to find there is an ambiguity in the language, because the prior agreements are part of the labour relations context and are not extrinsic evidence. In contrast, proposals made or discussions that occur during collective bargaining is extrinsic evidence and could not be considered without first finding an ambiguity in the language. However, there was no evidence of collective bargaining proposals or discussions presented at the hearing.

In the 1998-2003 collective agreement there was no reference in Article 9:09 to entitlement to vacation for an employee absent from work and receiving Workers' Compensation. The former Article 9:09 (b) stated that an employee would not lose seniority while off on long term disability

or Workers' Compensation benefits, but did not make reference to vacation entitlement. The current Article 9:09 (c) states that an employee shall be entitled to unused vacation "for the year he went off, plus one year full year vacation entitlement the year he returns". Within its context, the reference to "the year he went off" means the year the employee went off work, and "the year he returns" means the year he returns to work. The parties agree that there is no entitlement to vacation for the years in between the year an employee goes off work and the year he returns to work. In this case, the Grievor went off work in 2008. If it is found that he returned to work in 2010, and did not return to work in 2009, then he would not be entitled to vacation entitlement for 2009.

The Employer submits that return to work means return to preinjury duties. Article 9:09 (c) does not expressly state that return to work means return to preinjury duties. In October, 2009 the Grievor returned to the workplace on a return to work program, performed duties of his position for part of 2 days, and was paid by the Employer for the hours he worked. The Grievor returned to work under a return to work program, with the intent that he would eventually return to his preinjury employment. However, because of a recurrence of his injury in October, 2009, he was unable to continue with the program that year. The Grievor cooperated with the return to work program and completed what was expected of him within his medical capability.

The plain meaning of Article 9.09 (c) is that a return to work means attending at the workplace and performing duties of a position. There is no express statement in Article 9.09 (c) that return to work means return to the preinjury position. The Employer's interpretation, that return to work means return to the preinjury position, would have the effect of adding language to the Collective Agreement. The Arbitrator does not have authority to add language to the words in the Collective Agreement.

The Employer also referred to the legislation and policies applied by the WHSCC. I have considered the WHSCC legislation and policies on Return to Work and Rehabilitation for assistance in the interpretation of the Collective Agreement, to the extent that the legislation and policies are part of the labour relations context. Having regard to the legislation and policies, it is evident that a return to work plan may have various options, such as modified work, easeback and transfer to an alternate job. An injured worker, under a return to work plan, does not necessarily return to preinjury employment, and other alternatives may need to be found for the worker. The fact that the WHSCC policies refer to various options indicates the practical difficulty of placing an interpretation on Article 9:09 (c) that would qualify the meaning of "return" to work, as proposed by the Employer.

The Employer suggested there was a risk of abuse of the system, if the Arbitrator accepted the Union's interpretation of the Collective Agreement. According to the Employer, an employee might abuse the system by returning to work for one hour and then claiming one full year's vacation. It would follow, in the Employer's interpretation, that the parties would not have intended an interpretation with such a risk of abuse. There is no suggestion of abuse by the Grievor in this case. The Grievor's return to work was part of a detailed return to work plan, prepared by an occupational therapist, that set out the number of hours per day required to work. The Grievor's subsequent absence from the workplace as a result of recurrence of injury was approved by his medical doctor. The Grievor's case illustrates how the system requires approval of medical professionals. The likelihood of the risk of abuse of the system is diminished by the fact that there is medical review of the return to work plan and subsequent absence from work.

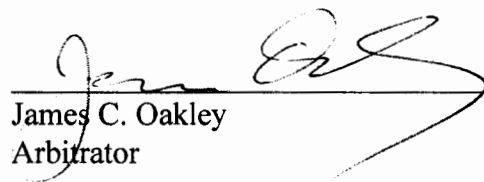
I have also considered that the interpretation of Article 9.09 (c) should be consistent with the language of Articles 11 and 12 and the Collective Agreement as a whole. In Article 11, eligibility for holiday pay is based on "work" and does not specify a requirement to work a regular 8 hour day. Also, entitlement to vacation pay under Article 12:04 is based on length of service. It is consistent with the Collective Agreement as a whole to apply the plain meaning of Article 9.09 (c) and to find that the Grievor returned to work in 2009.

I find the fact that the Grievor attended at the workplace, performed duties and was paid by the Employer meets the eligibility requirements for an employee to "return" within the meaning of Article 9:09 (c). The Grievor is entitled to be paid one full year vacation and other leave entitlements for the year 2009, pursuant to Article 9.09(c).

Decision

The grievance is allowed. The Grievor is entitled to be paid one full year vacation and other leave entitlements for the year 2009 pursuant to Article 9:09 (c).

DATED this 21st day of December, 2010.


James C. Oakley
Arbitrator